

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

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3
4 In the Matter of)
5) MUR 5646
6 Burton Cohen)
7 Cohen for New Hampshire and John Buchalski,)
8 in his official capacity as treasurer)
9

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11 **GENERAL COUNSEL'S REPORT # 2**

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13 **I. ACTIONS RECOMMENDED**

14 1. Find probable cause to believe that Burton Cohen violated 2 U.S.C. § 441i(e)(1)(A)
15 and 11 C.F.R. § 110.3(d).

16 2. Find probable cause to believe that Cohen for New Hampshire and John Buchalski, in
17 his official capacity as treasurer, violated 2 U.S.C. §§ 432(c), 432(h), and 439a(b); knowingly
18 and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d); knowingly and
19 willfully violated 2 U.S.C. § 434(b) with respect to all reporting violations except those relating
20 to the funds converted by Jesse Burchfield for his own personal use; and violated 2 U.S.C.
21 § 434(b) for failing to report the funds Jesse Burchfield converted to his own personal use.

22
23 **II. BACKGROUND**

24 The Commission previously found reason to believe that Burton Cohen knowingly and
25 willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) by using funds from his
26 state senate committee, raised outside the prohibitions, limitations and reporting requirements of
27 the Federal Election Campaign Act of 1971, as amended ("the Act"), for start-up expenses for his
28 U.S. Senate campaign. The Commission also found reason to believe that Cohen for New
29 Hampshire and John Buchalski, in his official capacity as treasurer ("the Committee"),

1 knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d); violated
2 2 U.S.C. §§ 434(b) and 432(c) by failing to file accurate disclosure reports with the Commission
3 and failing to keep an account of all of its disbursements; violated 2 U.S.C. § 439a(b) as result of
4 Campaign Manager Jesse Burchfield's use of campaign funds for personal use; and violated
5 2 U.S.C. § 432(h) by failing to make disbursements in excess of \$100 by checks drawn on the
6 Committee's bank account.

7 The ensuing investigation confirmed that Cohen and the Committee, through Cohen and
8 Burchfield, spent between \$23,800 and \$25,360 in state campaign funds to finance Cohen's
9 federal campaign; that the Committee, through Burchfield, used approximately \$10,000 in
10 campaign funds for his and other staffers' personal use; failed to disclose \$187,720 in
11 disbursements and misreported \$117,720 in receipts; failed to keep an accurate record of its
12 disbursements; and made cash disbursements in excess of \$100 through the use of an ATM card.
13 The investigation also confirmed that the Committee's impermissible use of state campaign
14 funds and its reporting violations were knowing and willful.

15 Based on the results of the investigation, we served General Counsel's Briefs on Cohen
16 and the Committee ("GC Brief (Cohen)" and "GC Brief (Committee)"), which are incorporated
17 herein by reference. [The General Counsel's Briefs set forth the factual and legal basis upon
18 which we are prepared to recommend that the Commission find probable cause to believe the
19 Respondents violated the Act.

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1 In response, Respondents argue that the Committee should not be held responsible for the
2 actions of its campaign manager, that there is no basis for holding the Committee responsible for
3 the personal use and excess cash disbursement violations, and that the admitted violation
4 concerning the impermissible use of state campaign funds was not knowing and willful.¹

5 However, it is well established that committees are liable for the acts of employees committed
6 within the scope of employment and the evidence gathered during the investigation confirms the
7 various violations of the Act. Accordingly, for the reasons set forth in the General Counsel's
8 Briefs and as discussed below, we recommend that the Commission make probable cause
9 findings as set forth in Section V _____

10 **III. ANALYSIS**

11
12 In short, Respondents argue that they should not be held responsible for violations of the
13 Act that resulted from Jesse Burchfield's actions because Burchfield acted as a rogue employee
14 when he used Committee funds for his and others' personal use, when he deliberately filed
15 inaccurate disclosure reports with the Commission and failed to keep accurate records, and when
16 he and Cohen spent state campaign funds for federal campaign expenses despite Burchfield's
17 knowledge that it was impermissible to do so. See e.g., Reply Brief at 1, 3, 4 and 6. At the same
18 time, Respondents admit that "Burchfield was solely responsible for all aspects of the
19 Committee's financial operations" and that "Jesse Burchfield controlled every aspect of the
20 campaign." *Id.* at 3 and 5. Indeed, the Committee acted only through Burchfield in conducting

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1 virtually all of its financial, reporting, and recordkeeping functions. As such, it would be
2 inconceivable not to attribute Burchfield's violations to the Committee. Just as the Commission
3 has never accepted employee incompetence as a defense to liability under the Act, a committee
4 should not be absolved of liability for violations stemming from a combination of dishonesty and
5 incompetence in the campaign manager it selected and in whom it vested broad authority to
6 operate the campaign and handle its finances.

7 Indeed, because political committees are artificial entities, they can only act through
8 individuals. In previous enforcement matters, the Commission considered and rejected the
9 argument that a committee cannot be liable for violations committed by its employees, even
10 where the violations were the result of criminal acts. *See, e.g.*, MURs 2602 (Rhodes to
11 Congress), 4919 (Charles Ball for Congress), 5610 (Dole North Carolina Victory Committee),
12 5721 (Lockheed Martin Employees PAC), 5811 (Doggett for U.S. Congress), 5812 (Ohio State
13 Medical Assoc. PAC), _____ and 5872 (Hague for Congress). The
14 Commission will look instead to whether the employee was acting within the scope of his or her
15 employment and whether the Committee maintained adequate safeguards and internal controls.
16 *See* GC Brief (Committee), at 8-9, 12-13. The matters involving Rhodes to Congress and Ball
17 for Congress are particularly noteworthy because knowing and willful liability was attributed to
18 the committees for particular violations when the employees/officials were acting to benefit those
19 committees.

20 For the reasons more fully discussed below, Cohen should be held responsible for his
21 own actions in impermissibly using state campaign funds to help finance his federal campaign
22 and the Committee should be held responsible for the actions of Cohen and Burchfield as to the

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1 impermissible use of state campaign funds and for the actions of Burchfield as to the remaining
2 violations.

3 **A. Cohen Impermissibly Used State Campaign Funds in His U.S. Senate**
4 **Campaign and the Committee, through Burchfield, Did So Knowingly**
5 **and Willfully**
6

7 Respondents admit that they used state campaign funds in the course of the federal
8 campaign, disputing only when they began using the funds and the Committee's liability for the
9 knowing and willful use of those impermissible funds.³ Reply Brief at 3-5.

10 With respect to when Respondents began to use state funds, Respondents contend that
11 housing and salary payments made from the state campaign to Burchfield in November and
12 December 2002 and his first salary payment on January 2, 2003, were attributable to his work on
13 the state campaign, that Burchfield did no work for the campaign during December and that the
14 campaign was not operational until January 2003. Reply Brief at 4-5. They dismiss as
15 unbelievable Burchfield's affidavit in which he states that he and Cohen interviewed fundraising
16 consultants for the federal campaign in December 2002, that his salary payments in November
17 and December 2002 were attributable to both the state and federal campaigns and that the

³ Respondents have, through the course of the investigation, also claimed that their use of state campaign funds was harmless because there were no impermissible funds in the state account, or most recently, almost none. Committee Reason to Believe Response at 4; Cohen Reason to Believe Response at 2; Reply Brief at 3. This is also incorrect. During our review of the state committee's bank records provided by the AUSA, we discovered corporate contributions, such as one from Phillip Morris Inc., contributions from LLCs, and contributions from individuals that when combined with contributions to the federal campaign exceeded the federal contribution limit. Nevertheless, 11 C.F.R. § 110.3(d) requires no showing that impermissible funds were in the state account; it prohibits all transfers from a candidate's state campaign to his or her federal campaign. As such, Respondents are also incorrect in stating that the state campaign could legally contribute \$1,000 to the Committee. Reply Brief at 3.

Respondents also contend that the state funds used for federal expenses were reported in the state campaign committee's reports. *Id.* at 4. This is also incorrect. In fact, the relevant state report omits the largest disbursement for the federal campaign, a \$6,500 payment to CHA, and contains other inaccuracies. See GC Brief (Committee) at 15.

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1 January 2, 2003 salary payment was for the federal campaign.⁴ Reply Brief at 5; Brief
2 (Committee) at 6; JB Aff. ¶10.

3 Contrary to Respondents' contentions, other evidence corroborates Burchfield's
4 statements that work began on the federal campaign in 2002, and, as such, that some of the 2002
5 salary and housing payments were for work on the federal campaign. Most significantly, Cohen
6 himself testified that he and Burchfield interviewed Harris and other fundraising consultants in
7 November and/or December 2002 and that they personally met L.A. Harris, the principal of
8 Cunningham Harris & Associates ("CHA") in Manchester, New Hampshire, to discuss hiring
9 him for the federal campaign in December following at least one phone conversation with him.
10 BC Tr. at 63-65; 68-75. In interviews, Harris confirmed that he discussed working for Cohen's
11 U.S. Senate campaign in a phone conversation prior to the meeting, which took place on
12 December 12, 2003 according to CHA expense records. In addition, e-mails from the
13 Committee's computer hard drive confirmed that Burchfield and Cohen were advertising for and
14 interviewing federal campaign staff during this time.⁵

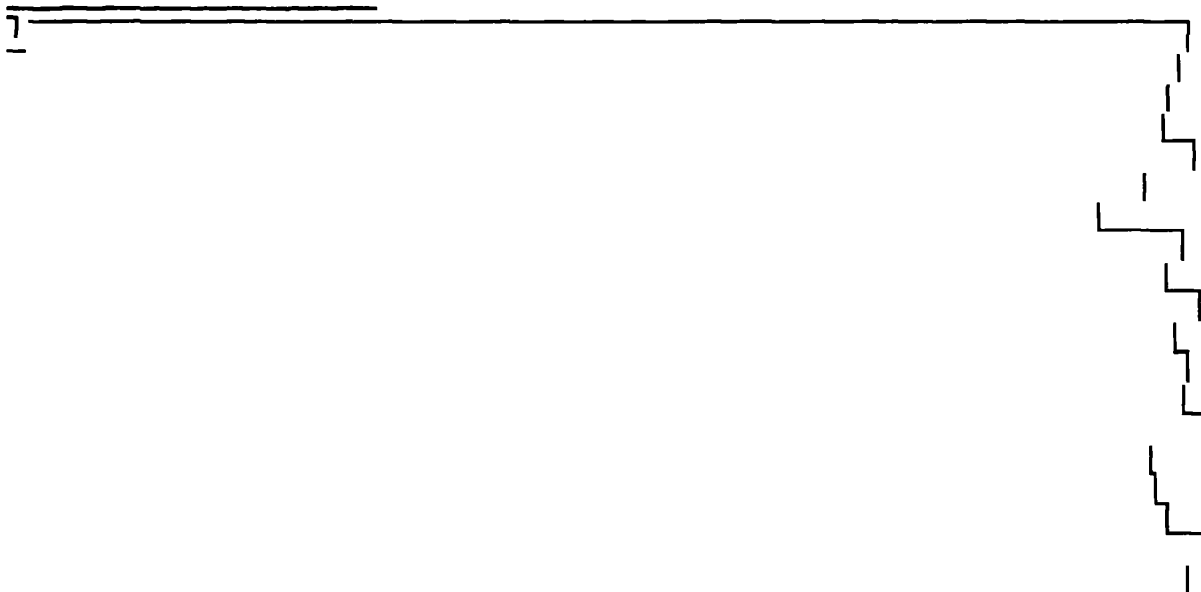
15 With respect to the knowing and willful nature of the state funds violations, Respondents
16 argue that the Committee should not be held responsible for Burchfield's admitted knowledge at

⁴ Burchfield's affidavit does not directly address the January 2003 salary payment but it is included in a list of state disbursements attached to the affidavit, most of which he identified as for the federal campaign. The list, Exhibit 1, is incorporated by reference into the affidavit.

⁵ A November 25, 2002 e-mail to politics1.com sent from Cohen's email account, to which Burchfield had access, forwarded the text for an advertisement seeking a finance director for the U.S. Senate campaign and listed Jesse Burchfield as the contact person. In a November 27, 2002 email, Cohen told a friend that "[n]ow, as planned I am gearing up for a run for U.S. Senate in '04. We're setting up an exploratory committee, interviewing key staff and focus[ing] on framing issues." A week later, he confirmed this in a December 5, 2002 e-mail to an associate, stating he was "interviewing for staff, and researching for well crafted positions on the economy," and asking the friend to put him in touch with people "like Soros and others[s]" to assist with fundraising.

1 the time of the violations that using state campaign funds for a federal campaign was prohibited,⁷
2 In appropriate cases, however, the Commission has attributed knowing and willful liability to
3 committees for the knowing and willful actions of its employees where their actions benefited the
4 committee. *See, e.g.*, MUR 2602 (Rhodes to Congress) (finding probable cause that the
5 committee knowingly and willfully violated the Act through the actions of its Finance
6 Chair/Assistant Treasurer that were undertaken in service of the Committee); MUR 4919
7 (Charles Ball for Congress) (finding probable cause that the committee knowingly and willfully
8 violated section 441h of the Act through the actions of its campaign manager who created a
9 phone bank/direct mail operation that fraudulently masqueraded as originating from the opposing
10 party to suppress voter turnout for that party's candidate, thereby benefiting the candidate and
11 committee).

12 In this matter, the state campaign funds benefited the federal campaign by serving as a
13 source to finance start-up expenses, and both Cohen and Burchfield admit they purposely set out
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1 to raise extra funds in the state campaign to finance a bid for higher office. GC Brief (Cohen) at
2 5. Burchfield and Cohen then went on to use those funds as planned (Reply Brief at 3-5), even
3 though Burchfield admittedly knew doing so for a federal campaign was prohibited. The only
4 way that a committee could ever be held liable for knowing and willful violations of the Act
5 would be through the actions of individual employees. There appear to be few, if any, more
6 compelling circumstances in which to hold a Committee liable for the knowing and willful
7 conduct of an employee than this one, where Burchfield, the campaign manager, was given the
8 authority to control "every aspect of the campaign." Reply Brief at 3.

9 Based on the Respondents' admissions and as set forth in the GC Briefs, we recommend
10 the Commission find probable cause to believe that Burton Cohen violated 2 U.S.C.
11 § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) and that the Committee knowingly and willfully
12 violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 110.3(d).

13 **B. The Committee Used Campaign Funds for the Personal Use of Staff and**
14 **Made Cash Disbursements Exceeding \$100**
15

16 Respondents argue that there is no evidence to support a violation of 2 U.S.C. § 439a(b)
17 because the Committee cannot legally be held liable for Burchfield's unauthorized personal use
18 of campaign funds and because there is no evidence that checks made payable to two campaign
19 staffers were for clothing expenses, a *per se* violation of Section 439a(b). Respondents are
20 incorrect as to both counts.

21 First, the Commission has found committees liable for violations of Section 439a(b)
22 resulting from the conversion of campaign funds to personal use by both campaign staff and
23 candidates. *See, e.g.*, MUR 5372 (Campbell for Senate) (holding committee and treasurer, in his
24 official capacity, liable for violating Section 439a(b) when the treasurer used campaign funds to

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1 pay for personal expenses including payments to an automobile dealership).⁷ Despite the
2 grounds for holding the Committee liable for all personal use of campaign funds in this matter,
3 the GC Brief (Committee) instead focused on checks given to two campaign staffers to purchase
4 clothing, not Burchfield's conversion of an estimated \$10,380, in recognition of the
5 Commission's recent practice in embezzlement cases not to pursue Committees for violating
6 Section 439a(b) when personal use stemmed from employee embezzlement. *See, e.g.*, MURs
7 5811 (Doggett for U.S. Congress) and 5872 (Hague for Congress).

8 Second, with respect to the checks paid to campaign staffers, totaling \$400, Respondents
9 contend that there is no evidence that the checks, copies of which they have produced with their
10 Reply Brief, were used for clothing. It is true that the checks on their face do not indicate a
11 purpose; however, the staffers to whom the checks are made payable, John Cluverious and Dan
12 Baker, represented in separate interviews that they received funds from Burchfield within a
13 couple of weeks of joining the campaign to buy clothing.⁸ Respondents do not deny that the
14 checks were for clothing allowances, stating instead that they are "aware of no evidence" that the
15 funds were used for that purpose. Reply Brief at 7.

16 Finally, Respondents deny that the Committee violated 2 U.S.C. § 432(h) because the

⁷ See also MUR 5895 (Meeks for Congress) (finding reason to believe that both the committee and candidate violated 439a(b) by using campaign funds to pay for the candidate's personal trainer, the candidate's share of automobile expenses for a car used for both personal and campaign purposes, and travel and clothing expenses paid for with a committee credit card); MUR 4617 (Mike Espy for Congress) (finding probable cause to believe that both the committee and candidate violated 439a(b) by using campaign funds to pay for legal fees related to an independent counsel investigation of the candidate for conduct that occurred during his tenure as a Cabinet member).

⁸ Both Cluverious and Baker said Burchfield had given them money to buy clothes. Although Baker believed they were given \$150-300 in cash to do so, Cluverious explained that Burchfield gave them "bonus" checks to purchase more suitable clothing about two weeks after he started. The March 4, 2004 check dates are consistent with Cluverious' memory as to the timing of the clothing allowance check; all other checks to these individuals were in greater amounts, consistent with their negotiated salary and housing payments.

GC Brief (Committee) fails to provide evidence that cash from any of the 29 ATM withdrawals made by Burchfield in excess of \$100 was used to pay for any specific Committee disbursement of more than \$100. Reply Brief at 7-8. Respondents dismiss Burchfield's sworn statement that he used the cash for both campaign and personal expenses and information provided in interviews with campaign staffers that cash was used for miscellaneous expenses, but they have offered no explanation or produced any information about how the funds were used except to speculate that Burchfield used all of the funds for his personal use. *Id.* at 7. They also opine that the miscellaneous cash disbursements that campaign staffers cited, video camera repairs and lunches, were "almost certainly" under \$100. *Id.* at 8.

Moreover, Respondents fail to address squarely the fact that undocumented ATM withdrawals themselves amount to violations of 2 U.S.C. § 432(h). GC Brief (Committee) at 11. In fact, no one can precisely account for how the ATM withdrawals were later used because the use of cash cannot be traced. As such, this is a perfect illustration of the purpose behind the statutory provisions that "no disbursements may be made . . . except by check" drawn on a committee's accounts, unless it is a petty cash disbursement of \$100 or less for which a journal must be maintained. 2 U.S.C. § 432(h)(1) and (2). Neither our investigation nor the Committee's audit was able to establish how the cash ATM withdrawals were used. In similar matters, the Commission has found that the committees violated Section 432(h) where they had undocumented cash disbursements. *See, e.g.,* Conciliation Agreement in MUR 5359 (Paul Williams for Congress) (providing that the committee violated 432(h) by making fifty-nine cash ATM withdrawals that exceeded the \$100 limit on cash transactions where the committee provided only an undocumented supposition during the audit that the money was used to reimburse volunteers for expenses); Conciliation Agreement in MUR 5442 (Keyes 2000, Inc.)

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(providing that the committee violated Section 432(h) by making cash disbursements totaling \$104,413, a portion of which arose from undocumented cash withdrawals made by committee staff using a debit card where the committee provided during the audit only a statement that virtually none of the cash was used for purchases greater than \$100); and Conciliation Agreement in MUR 3974 (Rangel for Congress)(providing that committee violated Section 432(h) by issuing checks payable to "cash" in excess of \$100 where disbursements were not made from a petty cash fund and no documentation supported the committee's claim that virtually all subsequent disbursement made from the cash were for \$100 or less.). Consequently, we recommend the Commission find probable cause to believe that the Committee violated 2 U.S.C. § 432(h) as a result of the 29 undocumented ATM withdrawals in excess of \$100 (totaling \$7,042) and that the Committee violated 2 U.S.C. § 439(b) for the personal use of campaign funds by its employees.

C. The Committee, through Burchfield, Failed to Keep Records of its Disbursements and Knowingly and Willfully Filed Inaccurate Disclosure Reports

The Committee failed to disclose disbursements totaling \$187,720 and inaccurately disclosed \$117,720 in receipts, in its reports filed with the Commission covering the period between January 1, 2003 and March 31, 2004. GC Brief (Committee) at 11-12. Respondents contend that the Committee should not be held responsible because Burchfield's reporting violations were for the purpose of covering up his embezzlement of Committee funds. Reply Brief at 6.

Importantly, the Reply Brief offers no factual support for its contention that all of the reporting and recordkeeping violations committed by Burchfield were to cover up his embezzlement of committee funds. The evidence demonstrates otherwise. At most, only a small

percentage (less than 5%) of the total reporting violations were the result of Burchfield's personal use of about \$10,000 in campaign funds. Even if we were to accept the Respondents' contention that all of the ATM withdrawals made by Burchfield were used for his personal expenses (Reply Brief at 7), at most Burchfield would have converted \$14,181 in campaign funds to personal use, which would not have necessitated the misreporting of almost \$300,000 to cover up his misdeeds. The more likely explanation is the one provided by Burchfield, namely that he deliberately inflated the Committee's reported cash on hand, primarily by underreporting disbursements, to make the campaign appear more financially viable. GC Brief (Committee) at 12-13. Cohen himself acknowledged in his deposition that " You know, I figured if we had money, we would not have a primary." BC Tr. at 85. In fact, Committee reports filed during the relevant time period did make the Committee appear to be more financially sound than was the case.

As set forth in the brief, Burchfield was vested with broad authority to handle the Committee's finances, ensure compliance with FEC law, and file its disclosure reports without adequate safeguards or internal controls to ensure the accuracy of the Committee's recordkeeping and reporting, and Burchfield was acting within the scope of that authority when he deliberately filed inaccurate disclosure reports and failed to maintain accurate disbursement records. GC Brief (Committee) at 8 (fn. 9), 13-14.⁹ The unchecked delegation of reporting, recordkeeping

⁹ Contrary to the Respondents' argument, Reply Brief at 6, attributing liability to the Committee is also consistent with the Commission's recent guidelines concerning internal controls. *Statement of Policy: Safe Harbor for Misreporting Due to Embezzlement*, 72 Fed. Reg. 16,695 (Apr. 5, 2007). While the Committee made corrections to its reports with the Commission and cooperated throughout the Commission's investigation, these factors are not exculpatory. To be eligible for the safe harbor, committees need to file amendments to their reports "as soon as" the violations are discovered and need to promptly inform the Commission about the situation. The Committee's responses to RAD RFAs failed to advise the Commission about any "misappropriation" and the Committee did not file comprehensive amendments correcting "any reporting errors due to the misappropriation" until almost four months after it was notified of the Commission's reason to believe findings. *Id.*; GC Brief (Committee) at 4.

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1 and compliance functions to Burchfield was particularly reckless given indications that
2 Burchfield was careless with reporting. GC Brief (Committee) at 15. Importantly, for the
3 purposes of attributing Burchfield's knowing and willful conduct to the Committee, most of
4 Burchfield's actions were intended to benefit the Committee by making it appear to be viable and
5 prevent it from folding. *Id.* at 13. *See also, supra*, at 7.

6 Based on the evidence, the Committee should be held responsible for its reporting and
7 recordkeeping violations, and further, should be held responsible, through Burchfield, for
8 knowing and willful reporting violations. Therefore, we recommend the Commission find
9 probable cause to believe that Committee violated 2 U.S.C. § 434(b) by failing to disclose the
10 estimated \$10,300 in disbursements attributable to Burchfield's conversion of campaign funds to
11 his personal use and that it knowingly and willfully violated 2 U.S.C. § 434(b) by failing to
12 disclose or accurately disclose the remaining \$295,059 in receipts and disbursements.⁷ With
13 respect to the failure to maintain adequate records, although Burchfield admitted to sloppy
14 recordkeeping, there is no evidence showing that this violation was knowing and willful.
15 Accordingly, we recommend that the Commission find probable cause to believe the Committee
16 violated 2 U.S.C. § 432(c).

(Footnote 9 continued from previous page)

Moreover, all of the Committee's actions took place after it failed to maintain sufficient internal controls and safeguards that could have prevented Burchfield's actions. Regardless, the Committee did not need the Commission's policy statement to know that it had poor internal controls; the controls suggested in the Commission's policy as minimum safeguards were taken from well-known accounting principles. *See Commission Policy Statement Regarding Internal Controls for Political Committees* (approved by the Commission on March 22, 2007).

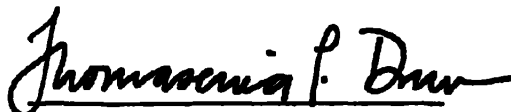
10 V. **RECOMMENDATIONS**


- 11
- 12 1. Find probable cause to believe that Burton Cohen violated 2 U.S.C. § 441i(e)(1)(A)
- 13 and 11 C.F.R. § 110.3(d).
- 14

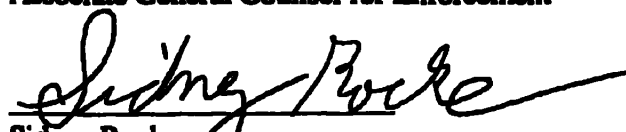
2. Find probable cause to believe that Cohen for New Hampshire and John Buchalski, in his official capacity as treasurer, violated 2 U.S.C. §§ 432(c), 432(h) and 439a(b).
3. Find probable cause to believe that Cohen for New Hampshire and John Buchalski, in his official capacity as treasurer, knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).
4. Find probable cause to believe that Cohen for New Hampshire and John Buchalski, in his official capacity as treasurer, knowingly and willfully violated 2 U.S.C. § 434(b) with respect to all reporting violations except those relating to the funds converted by Jesse Burchfield for his own personal use.
5. Find probable cause to believe that Cohen for New Hampshire and John Buchalski, in his official capacity as treasurer, violated 2 U.S.C. § 434(b) for failing to report the funds Jesse Burchfield converted to his own personal use.

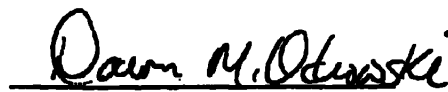
7. Approve the appropriate letter.

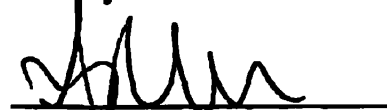
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